

FINAL AWARD ALLOWING COMPENSATION
(Affirming Award and Decision of Administrative Law Judge)

Injury No.: 04-072330

Employee: Eleanora Breese

Employer: SBC Services, Inc. (Settled)

Insurer: Insurance Company of the State of PA (Settled)

Additional Party: Treasurer of Missouri as Custodian
of Second Injury Fund

The above-entitled workers' compensation case is submitted to the Labor and Industrial Relations Commission (Commission) for review as provided by § 287.480 RSMo. Having reviewed the evidence and considered the whole record, the Commission finds that the award of the administrative law judge is supported by competent and substantial evidence and was made in accordance with the Missouri Workers' Compensation Law. Pursuant to § 286.090 RSMo, the Commission affirms the award and decision of the administrative law judge dated June 18, 2013. The award and decision of Administrative Law Judge Suzette Carlisle, issued June 18, 2013, is attached and incorporated by this reference.

The Commission further approves and affirms the administrative law judge's allowance of attorney's fee herein as being fair and reasonable.

Any past due compensation shall bear interest as provided by law.

Given at Jefferson City, State of Missouri, this 14th day of February 2014.

LABOR AND INDUSTRIAL RELATIONS COMMISSION

John J. Larsen, Jr., Chairman

James G. Avery, Jr., Member

Curtis E. Chick, Jr., Member

Attest:

Secretary

AWARD

Employee: Eleanora Breese

Injury No.: 04-072330

Dependents: N/A

Employer: SBC Services, Inc. (Settled)

Before the
**Division of Workers'
Compensation**
Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Insurance Company of the State of PA
c/o Sedgwick Claims Management (Settled)

Hearing Date: March 14, 2013

Checked by: SC

FINDINGS OF FACT AND RULINGS OF LAW

1. Are any benefits awarded herein? Yes
2. Was the injury or occupational disease compensable under Chapter 287? Yes
3. Was there an accident or incident of occupational disease under the Law? Yes
4. Date of accident or onset of occupational disease: April 29, 2004
5. State location where accident occurred or occupational disease was contracted: St. Louis City
6. Was above employee in employ of above employer at time of alleged accident or occupational disease? Yes
7. Did employer receive proper notice? Yes
8. Did accident or occupational disease arise out of and in the course of the employment? Yes
9. Was claim for compensation filed within time required by Law? Yes
10. Was employer insured by above insurer? Yes
11. Describe work employee was doing and how accident occurred or occupational disease contracted:
Claimant developed bilateral carpal tunnel syndrome from repetitive data entry work over a number of years.
12. Did accident or occupational disease cause death? No
13. Part(s) of body injured by accident or occupational disease: Bilateral hands/wrists
14. Nature and extent of any permanent disability: 17.5% PPD of each wrist (Settled prior to hearing)
15. Compensation paid to-date for temporary disability: \$4,747.62
16. Value necessary medical aid paid to date by employer/insurer? \$15,519.30

Employee: Eleanora Breese

Injury No.: 04-072330

- 17. Value necessary medical aid not furnished by employer/insurer? N/A
- 18. Employee's average weekly wages: Sufficient for the rate listed in number 19 below.
- 19. Weekly compensation rate: \$496.02/\$347.05 per week
- 20. Method wages computation: Stipulated

COMPENSATION PAYABLE

- 21. Amount of compensation payable:

weeks of permanent partial disability from Employer (Settled prior to hearing)

- 22. Second Injury Fund liability: Yes

Permanent total disability benefits from Second Injury Fund:
weekly payment of \$496.02 payable by SIF beginning May 11, 2006,
and continuing for Claimant's lifetime

TOTAL: INDETERMINATE

- 23. Future requirements awarded: N/A

Said payments to begin and to be payable and be subject to modification and review as provided by law.

The compensation awarded to the claimant shall be subject to a lien in the amount of 20% of all payments hereunder in favor of the following attorney for necessary legal services rendered to the claimant: Mark E. Moreland

FINDINGS OF FACT and RULINGS OF LAW:

Employee: Eleanora Breese

Injury No.: 04-072330

Dependents: N/A

Before the
**Division of Workers'
Compensation**

Employer: SBC Services, Inc. (Settled)

Department of Labor and Industrial
Relations of Missouri
Jefferson City, Missouri

Additional Party: Second Injury Fund

Insurer: Insurance Company of the State of PA
c/o Sedgwick Claims Management (Settled)

Checked by: SC

PRELIMINARIES

The parties appeared before the undersigned administrative law judge on March 14, 2013 for a final hearing to determine the liability of SBC Services, Inc., ("Employer") and Insurance Company of the State of PA ("Insurer"), at the request of Eleanora Breese ("Claimant"). Attorney Mark Moreland represented Claimant. The Employer settled with Claimant prior to the hearing and did not participate in the hearing. Assistant Attorney General Tim Maurer represented the Second Injury Fund ("SIF"). Jurisdiction lies with the Division of Workers' Compensation. The record closed after presentation of the evidence. The court reporter was Jennifer Jett.

The parties stipulated that on or about April 29, 2004¹:

1. Claimant sustained an injury by occupational disease in St. Louis City.
2. Venue is proper.
3. Claimant was employed by Employer.
4. Employer and Claimant operated under the Missouri Workers' Compensation Law².
5. Employer received timely notice of the injury.
6. A Claim for Compensation was timely filed.
7. Employer's liability was fully insured.
8. Employer paid temporary total disability ("TTD") in the amount of \$4,747.62 for 9 4/7 weeks, and medical benefits totaling \$15,519.30.
9. Claimant achieved maximum medical improvement ("MMI") on October 1, 2004.
10. Claimant's compensation rate is \$496.02 for TTD and permanent total disability ("PTD"), and \$347.05 for permanent partial disability (PPD)

The sole issue for disposition is the nature and extent of SIF liability for either PPD or PTD benefits, if any.

¹ The transcript states the date of injury as May 24, 2004, however, AICS listed the injury date as April 29, 2004.

² All references in this award are to the 2005 Revised Statutes of Missouri unless otherwise stated.

Exhibits

Claimant's Exhibits A through H and SIF's roman numeral I were received into evidence without objection. Any objections contained in the depositions but not expressly ruled on during the hearing or in this award are now overruled. To the extent there are marks or highlights contained in the exhibits, they were made prior to becoming part of this record, and were not placed there by the undersigned administrative law judge.

FINDINGS OF FACT

All evidence was reviewed but only evidence that supports this award is discussed below.

At the time of the hearing, Claimant was a 62-year-old high school graduate, who lived alone, and she has one adult son. After high school, Claimant worked briefly as an insurance agent and as a supervisor for a concession stand at a movie theater.

Preexisting Disabilities

In Claimant's twenties, she developed fibromyalgia. Prior to 2004, her symptoms included joint and muscle pain, and difficulty with focus and memory. To alleviate pain, Claimant took muscle relaxers, pain medication, and physical therapy. Claimant began to use a cane in the 1990s due to decreased mobility from fibromyalgia.

In December 1999 Claimant sustained a "TIA."³ A second one occurred early in 2006, when Claimant was hospitalized. Another "TIA" occurred when she was sleeping. The second TIA affected Claimant's speech, so she emailed at work to compensate; however, the impact on Claimant's speech was temporary. Claimant takes Plavix to prevent strokes.

Claimant had left foot surgery three times before 2004 to remove heel spurs. She also had plantar fasciitis. The conditions have not worsened since 2004. Also, she was diagnosed with asthma and took medication as needed. Once, she left work due to chemical exposure.

In 2000, Claimant's supervisor helped her to get a scooter, which she continues to use. Prior to 2004 Claimant used the scooter to get around at work. Claimant received a handicapped parking space, bought a van and installed a lift for the scooter.

Prior to the carpal tunnel injury in 2004, Claimant occasionally needed help to unload the scooter and other aids from the van because of leg complaints. Also, co-employees obtained lunch for Claimant. Workers wheeled Claimant to meetings in a chair before she obtained the scooter.

Prior to 2004, co-employees filed paperwork, faxed documents, and assisted Claimant as needed. Her office was rearranged to accommodate the scooter, and a place to recharge it. An assistant was assigned to Claimant prior to hand surgery. Different co-employees assisted after hand surgery. In early 2004 Claimant took two hydrocodone pills per night for pain.

³ The record contains evidence the TIA may have been related to a stroke.

Claimant worked for Employer from 1981 to May 10, 2006. Twenty-three years were spent as a Senior Records Clerk A. Claimant worked eight hours a day, and spent 90 percent of the day inputting data into the computer. Claimant worked overtime as needed. Claimant learned three computer systems because of divestiture and downsizing. The systems were not integrated.

The work injury

In the early 2000s Claimant began to experience numbness and pain in both hands. To alleviate symptoms, Claimant wore wrist splints at work, and Employer provided a specialized keyboard with a place to rest her hands.

Claimant's symptoms continued and she received medical treatment from Dr. Naseer, who diagnosed bilateral carpal tunnel syndrome. Dr. Hehmann performed a carpal tunnel release in April 2004 on the right wrist. In June 2004 Dr. Hehmann surgically repaired the left wrist. Dr. Hehmann prescribed medication and physical therapy, and kept Claimant off work for a period of time.

Stephen M. Benz, M.D., examined Claimant on August 3, 2004, diagnosed work-related carpal tunnel syndrome, and released her to work full duty, with no restrictions.

Surgery eliminated pain and numbness but Claimant continued to have decreased grip strength. Her ability to type decreased, as well as her ability to perform repetitive typing during the day. Claimant had difficulty opening bottles, doors, and jars, and holding a knife to slice food. Claimant was never disciplined because of her limitations.

In July 2004 Claimant returned to work and became trapped in the ladies' room because she could not open the door. She attempted to pull the door but her hand slipped off and pain radiated up her right arm. Claimant sat in the stall until someone opened the door. To prevent being locked in the bathroom, Claimant rode her scooter to the 14th floor and operated push button equipment. Prior to 2004 Claimant was able to use the bathroom in her work area.

After carpal tunnel surgery, two people drove Claimant to work until November 2004 when she was released to drive. During that time she received assistance getting her scooter in and out of the van. At the end of the day, co-employees helped Claimant load the scooter into the van and assisted with scooter problems.

After Claimant started driving, her supervisor Mr. Steve Seloff met her every morning and evening to help unload and reload the scooter. Claimant only needed Mr. Seloff's assistance with the scooter after hand surgery. Also, after hand surgery, Claimant received a designated parking spot at work so she could ride the scooter across the bridge.

Claimant continued to work because the company needed the knowledge she possessed about four data systems used by the company, which they planned to consolidate. Also, she enjoyed working with her co-employees, who enabled her to work as long as she did. Her supervisor frequently drove her home, and stayed with her at the emergency room on one occasion.

Claimant worked full time from July 2004 to May 2006 when she took early retirement. Claimant retired because her job transferred to Dallas, Texas and she would not have a support system if she moved.

Claimant unsuccessfully tested for other jobs with Employer. However, she lacked program knowledge and could not pass the typing test due to hand complaints.

At home, she has trouble mopping, sweeping, and vacuuming. Before Claimant developed carpal tunnel syndrome, she had some difficulty with housework due to fatigue, and difficulty standing and walking. Her granddaughter helps her clean the house, and her son lifts heavy items when she shops. She uses a stool to care for her personal needs.

Subsequent disability

Between 2005 and 2007, Dr. Konzen prescribed physical therapy for Claimant's low back and hip pain. However, Claimant does not believe the pain is worse now than in 2004. Now she takes Lyrica for fibromyalgia.

In January 2006 Claimant was hospitalized for a week for asthma and bronchitis. In 2006 Claimant sustained a second TIA which temporarily increased her memory loss. In May 2006 Claimant gave Dr. Konzen a history of difficulty staying awake more than four hours during a shift.

Expert Medical Evidence

Thomas F. Musich, M.D., a physician board certified in family practice, performed an independent medical examination on September 6, 2007 at the request of her attorney. Claimant appeared for the examination riding a motorized scooter and using a cane.

For the primary injury, Dr. Musich diagnosed bilateral carpal tunnel syndrome, and concluded Claimant's decreased grip strength and pain resulted from carpal tunnel syndrome and not fibromyalgia.

Dr. Musich opined bilateral carpal tunnel syndrome combined with sleep apnea, fibromyalgia, and obstructive airway disease creates more overall disability. From a medical standpoint, Dr. Musich concluded Claimant could not obtain and maintain full-time employment based on her level of complaints related to bilateral carpal tunnel syndrome, fibromyalgia, sleep apnea, and obstructive airway disease. Therefore he concluded Claimant was totally and permanently disabled due to present and past disabilities, and need for support system to function daily.

Dr. Musich rated 25% PPD of each wrist for carpal tunnel syndrome, and 65% PPD of the body as a whole for preexisting fibromyalgia, asthma, and sleep apnea.

Dr. Musich recommended the following restrictions based on carpal tunnel syndrome: avoid repetitive hand activities. For fibromyalgia, sleep apnea, and obstructive airways disease, Dr. Musich restricted operation of machinery or activities that require repetitive bending, kneeling or standing more than 15 minutes, or climbing.

Dr. Musich agreed Claimant's job was highly accommodated prior to April 2004; Claimant used the scooter, cane and walker to walk, and relied on helpers both at work and home to assist with work, her daily needs, and household chores.

Mr. James M. England Jr. performed a records review at SIF's request in February 2008. He reviewed Claimant's education, vocational history, limitations and restrictions, and Claimant's deposition testimony. Mr. England did not believe an interview was needed to reach a conclusion about Claimant's ability to work because he had sufficient background information.

Mr. England concluded Claimant was only able to work at the sedentary level with accommodations. Furthermore, he opined Claimant's inability to work was based on preexisting obesity, and limited mobility, without considering bilateral carpal tunnel syndrome. In addition, Mr. England noted the preexisting conditions continued to deteriorate. Mr. England did not believe Claimant could compete or sustain employment based on multiple preexisting medical conditions. Furthermore, Mr. England opined Claimant would be unemployable even if she had no hand complaints.

Mr. England noted Claimant's extended use of a scooter and cane to move around in the office, and the need for other workers to help her perform her job duties, and memory loss issues related to the strokes. Mr. England noted Claimant's history of trouble staying awake at work, and speech difficulties, which also prevent sedentary work.

Mr. England further noted Employer accommodated Claimant for a long time; however, he was unaware of any additional accommodations made by Employer after Claimant returned to work from carpal tunnel surgery.⁴

Mr. Gary Weimholt, a vocational rehabilitation consultant, interviewed Claimant at the request of her attorney on April 15, 2008. He took a history, reviewed medical records, assessed vocational characteristics, and performed a job history.

Mr. Weimholt concluded Claimant's limited ability to ambulate, need for a scooter, and walker limited her to sedentary work due to fibromyalgia and heel problems. However, Mr. Weimholt concluded Claimant was not employable in the open labor market because of the additional restriction of no repetitive hand movements and hand weakness resulting from carpal tunnel syndrome.

Mr. Weimholt noted employers are more likely to accommodate valuable employees to keep them employed. However, he opined Claimant's restrictions before November 2004 would impact Claimant's ability to compete in the open labor market.

⁴ Mr. England was unaware a security guard and a supervisor assisted Claimant with moving the scooter in and out of the van after she returned to work.

ADDITIONAL FINDINGS OF FACT and RULINGS OF LAW

Claimant asserts she is PTD due to a combination of her primary injury and preexisting disabilities. SIF contends if Claimant is PTD, she was PTD before she developed carpal tunnel syndrome, or it is due to subsequent deterioration of her preexisting medical conditions; therefore, SIF is not liable.

After a review of the medical records, and based on Claimant's testimony, presentation at the hearing, and the applicable law of the State of Missouri, I find Claimant met her burden to show she is PTD due to a combination of the carpal tunnel syndrome and her preexisting medical conditions for the reasons stated below.

Claimant sustained PPD from the last injury

In a workers' compensation proceeding, the employee has the burden to prove by a preponderance of credible evidence all material elements of the claim, including SIF Liability. ***Meilves v. Morris***, 422 S.W.2d 335, 339 (Mo. 1968). Claimant must establish a compensable work injury was sustained and prove the nature and extent of disability to a reasonable degree of certainty. ***Downing v. Willamette Industries, Inc.***, 895 S.W.2d 650, 655 (Mo. App. 1995).⁵

In deciding whether SIF has any liability, the first determination is the degree of disability from the last injury considered alone. ***Hughey v. Chrysler Corp.***, 34 S.W.3d 845, 847 (Mo. App. 2000). [P] re-existing disabilities are irrelevant until the employer's liability for the last injury is determined. ***Id.*** If the last injury in and of itself rendered Claimant permanently and totally disabled, then the SIF has no liability. ***Id.*** (*Citations omitted*).

I find Claimant's testimony was generally credible. Claimant testified she continues to have hand pain, weakness and decreased grip strength after carpal tunnel surgery. Dr. Musich rated 25% PPD of each wrist. I find Claimant sustained 17.5% PPD of each wrist from the primary injury.

Claimant's preexisting disability creates a hindrance or obstacle to employment or reemployment

I find Claimant's preexisting disabilities were a hindrance or obstacle to her employment or reemployment prior to May 2004. Claimant used a scooter, cane, and walker to move about the work place. Prior to the scooter, co-employees rolled Claimant in a chair to meetings. Her office was rearranged to accommodate the scooter and to charge it. Co-employees performed aspects of Claimant's work including faxing and filing, getting Claimant's lunch, and helping her into and out of her vehicle. Also, prior to April 2004, Claimant missed time from work for various illnesses.

⁵ Several cases herein were overruled by ***Hampton*** on grounds other than those for which the cases are cited. No further reference will be made to ***Hampton***.

Claimant is permanently and totally disabled from the primary and preexisting conditions

To establish entitlement to permanent total disability benefits, Claimant must also prove all of the injuries and conditions combined, including the last injury, resulted in the employee being permanently and totally disabled. ***Boring v. Treasurer***, 947 S.W. 2d 483 (Mo. App. 1997).

The test for permanent total disability is the worker's ability to compete in the open labor market in that it measures the worker's potential for returning to employment. ***Sutton v. Vee Jay Cement Contracting Co.***, 37 S.W.3d 803, 811 (Mo. App. 2000). The primary determination is whether an employer can reasonably be expected to hire the employee, given their present physical condition, and reasonably expect them to successfully perform the work. ***Knisley v. Charleswood Corp.***, 211 S.W.3d 629, 635 (Mo.App.2007).

I do not find Mr. England's opinion credible that Claimant was PTD prior to developing carpal tunnel syndrome. Clearly, Claimant was heavily accommodated, but she continued to work full duty and overtime leading up to the development of carpal tunnel syndrome. After hand surgery, more accommodations were made. For a while she was driven to work. Someone met her in the parking garage twice a day to help her unload and reload the scooter because her hands were too weak to perform the task. Also, Mr. England's opinion is not credible that Claimant's preexisting disabilities worsened because he is not a medical doctor. ***See Ronald Michael v. Treasurer, State of Missouri***, 334 S.W.3d 654, 666 (Mo.App.2011). The record contains no medical evidence to support Mr. England's assertion.

I find more credible the opinions of Dr. Musich and Mr. Weimholt that Claimant is PTD due to her preexisting disabilities and the primary injury. Mr. Weimholt identified a narrow labor market for sedentary employment if Claimant could use her hands, move about easily, and perform repetitive data entry work or use communication skills. However, Dr. Musich noted severe hand weakness and imposed restrictions, and Claimant reported hand pain with activity. Therefore, Mr. Weimholt found no work Claimant could perform in the open labor market.

Mr. Weimholt interviewed Claimant and testified an employer is more likely to accommodate a valuable employee than to make accommodations for a new one. Here, Claimant worked for Employer for 25 years and possessed exclusive knowledge of four data entry systems they were trying to integrate. Employer accommodated Claimant's work performance, and offered Claimant a transfer to Dallas when the office moved. However, Claimant opted for early retirement because she would not have the support system she needed in Dallas. She had the support in St. Louis. Mr. Weimholt predicted Claimant would not find a similar support system in Dallas or on any job in St. Louis. This was confirmed when Claimant was rejected for other jobs with Employer after she failed the test for Microsoft Word.

Mr. Weimholt further testified that Claimant would be at a disadvantage over able bodied candidates when she appeared for the interview on the scooter and could not move from the van to the interview site without assistance.

During the hearing, I observed Claimant enter the room on her scooter and she carried a cane. Claimant testified while seated on the scooter. During recess she had difficulty getting to and from the restroom.

Based upon credible testimony by Claimant, Dr. Musich, and Mr. Weimholt, and less than credible testimony by Mr. England, I find no employer can reasonably be expected to hire Claimant in her present physical condition, and reasonably expect her to successfully perform the work. I find Claimant is PTD due to her preexisting medical conditions and bilateral carpal tunnel syndrome.

Commencement date of permanent total disability payments

In cases of permanent total ...disabilit[y], payment is due at the start of the disability. Thus, payment should have begun when the disability began. ***Kramer v. Labor & Indus. Relations Commission***, 799 S.W.2d 142, 145 (Mo.App. 1990).

The parties stipulated Claimant reached MMI October 1, 2004, therefore, I find Claimant reached MMI on that date. However, Employer continued to heavily accommodate Claimant until May 10, 2006. To Claimant's credit, she continued to work. I further find PTD benefits should be suspended through May 10, 2006, and compensation should begin retroactively on May 11, 2006.

I previously found Claimant sustained 17.5% PPD of each wrist as a result of the April 29, 2004 injury. Therefore, I find SIF liable for \$496.02 per week commencing retroactively on May 11, 2006, for the remainder of Claimant's life.⁶ ***Laturno v. Carnahan***, 640 S.W.2d at 471-72 (Mo.App.1982).

CONCLUSION

Claimant is permanently and totally disabled due to the combination of her primary injury and preexisting disabilities as outlined in page 2 of the award. The award is subject to a lien in favor of Claimant's attorney for legal services rendered.

Made by: _____
 Suzette Carlisle
 Administrative Law Judge
 Division of Workers' Compensation

⁶ Employer owed PPD benefits from October 2, 2004 to December 3, 2005 (61.25 weeks). SIF owed a differential payment during the same time period, and the full payment beginning December 4, 2005. However, no payments should be paid through May 10, 2006 when Claimant continued to work.